THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

COMMANDER EMILY SHILLING; *et al.*,

Plaintiffs,

DONALD J. TRUMP, in his official capacity as President of the United States; *et al.*,

Defendants.

No. 2:25-cv-241

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR: MARCH 19, 2025

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I. INTRODUCTION

Notwithstanding Plaintiffs' years of distinguished and patriotic military service, the Military Ban and Defendants' implementing guidance would categorically bar them and all other transgender servicemembers from the military for no reason other than because they are transgender. This exclusion of an entire group of people from military service based on a characteristic that the military itself has concluded has no bearing on fitness to serve is blatantly unconstitutional, for the reasons explained in Plaintiffs' Motion.

In response, Defendants argue for unbridled deference to their "professional military judgment" and try to downplay the Ban as something less than a bar to service by transgender people. But "deference does not mean abdication," *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981), particularly when the Ban "is soaked in animus and dripping with pretext." **Exhibit 36** (hereafter "*Talbott* Op."), at 64.[1] And as Defendants have proclaimed, under the Ban, "*[t]ransgender* troops are disqualified from service." Dkt. 61-2 (emphasis added).

Defendants argue about military readiness but ignore unrefuted evidence undermining their contentions: years of experience and numerous declarations demonstrating that transgender servicemembers like Plaintiffs enhance rather than undermine military readiness and unit cohesion. As the court in *Talbott v. Trump* stated, "the cruel irony is that thousands of transgender servicemembers have sacrificed—some risking their lives—to ensure for others the very equal protection rights the Military Ban seeks to deny them." *Talbott* Op. at 5.[2]

Finally, Defendants minimize the devastating harm to Plaintiffs from losing their careers and their livelihoods as "subject to remediation" because they can appeal to military administrative boards. But no transgender person could prevail before such a board in the face of a policy directing that they be separated because of *who they are*.

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[1] Exhibits are attached to the Second Supplemental Declaration of Matthew Gordon.

[2] The entry of the preliminary injunction in *Talbott* does not counsel against the entry of a preliminary injunction here. *See Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F.Supp.3d 1, 59-60 (D.D.C. 2020).

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The Ban and its implementing guidance are already threatening significant harm. Plaintiffs and other transgender servicemembers are being reassigned, denied advancement opportunities, and placed on involuntary administrative absence. Without injunctive relief, their distinguished military careers will be over. Plaintiffs ask this Court to ensure that those sacrifices are not in vain.

II. ARGUMENT

A. Administrative Exhaustion Is Not Required.

Defendants argue that judicial review is premature because Active-Duty Plaintiffs have not exhausted the administrative procedures prescribed by the February 26 Guidance. Dkt. 76 at 13-14. But administrative exhaustion is not required because Plaintiffs' claims raise "substantial constitutional questions" and seeking administrative relief would be futile. *See Talbott* Op. at 37-39. Defendants attempt to evade this by highlighting the deference afforded internal administrative procedures within the military. But no level of administrative deference can bypass Active-Duty Plaintiffs' right to seek relief to prevent violations of their constitutional rights.

Constitutional challenges may bypass administrative exhaustion requirements because such issues often must be resolved by courts and not administrative boards. *See Muhammad v. Sec'y of Army*, 770 F.2d 1494, 1495 (9th Cir. 1985) (administrative exhaustion not required "if substantial constitutional questions are raised"); *Charles Schwab & Co. v. Fin. Indus. Regul. Auth. Inc.*, 861 F.Supp.2d 1063, 1074-75 (N.D. Cal. 2012). Here, Plaintiffs bring claims under the First and Fifth Amendments. Each claim implicates "substantial constitutional questions" reserved for resolution in a judicial forum.

Indeed, constitutional claims are "singularly suited" to judicial forums and are clearly inappropriate for military boards. *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973); *see also Adair v. England*, 183 F.Supp.2d 31, 55 (D.D.C. 2002), *aff'd sub nom. In re Navy Chaplaincy*, 2020 WL 11568892 (D.C. Cir. Nov. 6, 2020); *cf. Elgin v. Dep't of Treas.*, 567 U.S. 1, 28-29 (2012) (Alito, J., dissenting) ("facial constitutional" claims challenging military draft were "entirely outside the Board's power to decide").

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Moreover, "[w]here the agency's position 'appears already set' and recourse to administrative remedies is 'very likely' futile, exhaustion is not required." *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 896 (9th Cir. 2021). The Ban establishes a *categorical bar* on military service by transgender persons—mandating implementation without discretion. *See* Military Ban §§1, 2; *see also* Dkts. 58-7, 64-1. The "waiver" set forth in the implementing guidance (Dkts. 58-7, 64-1) is no exception at all, as in reality, no transgender person can meet the conditions for this purported "waiver." Ettner Suppl. Decl. ¶¶13-14; Wagner Suppl. Decl. ¶¶17-18; Skelly Suppl. Decl. ¶10; *see also Talbott* Op. at 63. Because Defendants' position "appears already set," internal military procedures are futile, and Active-Duty Plaintiffs need not exhaust them before seeking judicial review.

B. The Military Ban Violates the Fifth Amendment's Equal Protection Guarantee.

The Ban and its guidance purposefully bar transgender persons from military service based on animus towards transgender people. They also facially classify based on transgender status and sex. They are thus subject to heightened scrutiny, *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019), which requires courts to "smoke out" improper uses of suspect lines, *Johnson v. California*, 543 U.S. 499, 506 (2005), and to ensure that laws do not "classify unnecessarily and overbroadly … when more accurate and impartial lines can be drawn." *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017).

1. The Ban is Motivated by Animus and Is Therefore Unconstitutional.

The Ban and its guidance are plainly motivated by animus towards transgender people. Both state, without any basis, that being transgender is inconsistent with "honesty, humility, … and integrity." Military Ban §2; Dkt. 58-7, §1(b). They both also incorporate the Gender Order, which defines "gender ideology" as the "false claim that males can identify as and thus become women and vice versa." Dkt. 31-13 §2(f). And again, the primary justification for the Ban is that "*adoption of a gender identity inconsistent with an individual's [birth] sex* conflicts with a soldier's commitment to an honorable, truthful, and disciplined lifestyle, *even in one's personal life*."

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Military Ban §1 (emphasis added). The Ban's "language is unabashedly demeaning, its policy stigmatizes transgender persons as inherently unfit, and its conclusions bear no relation to fact." *Talbott* Op. at 64.

Defendants argue that *Trump v. Hawaii*, 585 U.S. 667 (2018), counsels otherwise, but that was a First Amendment—not equal protection—case, and the proclamation at issue there was "*expressly* premised on legitimate purposes" and "*[t]he text sa[id] nothing about religion*." *Id.* at 706 (emphasis added). *See also Talbott* Op. at 43-44. Here, by contrast, the Ban is expressly premised on an illegitimate purpose—animus.

The Constitution forbids policies that on their face result from "negative attitudes" and "irrational prejudice." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985). As explained in Plaintiffs' briefs (Dkt. 23, at 21-22; Dkt. 60, at 6-7), the Ban is dripping with animus and reflects a "bare … desire to harm" transgender people, "identif[ying] persons by a single trait and then den[ying] them protection across the board," constituting "a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 517 U.S. 620, 633-34 (1996). There is no basis for this animus-laden motivation. The honorable and distinguished service records of Active-Duty Plaintiffs prove how meritless the offensive assertions in the Ban are—assertions also contradicted by the implementing guidance's directive that transgender servicemembers' separations be deemed "honorable." Dkt. 58-7, §1(e). Because the Ban reflects animus on its face and seeks to "deem a class of persons a stranger to [our] laws," it is unconstitutional. *Romer*, 517 U.S. at 635.

2. The Ban Purposefully Discriminates Based on Transgender Status.

The Ban and its guidance also "distinguish[] on the basis of transgender status, a quasi-suspect classification, and [are] therefore subject to intermediate scrutiny." *Karnoski v. Trump*, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017). Defendants ask the Court to ignore the controlling law of this Circuit, arguing the Ban turns on gender dysphoria rather than transgender status. Dkt. 76 at 15. But the Ninth Circuit already rejected this argument. *Karnoski*, 926 F.3d at 1201. In *Karnoski*, the court considered a 2018 ban that was far less sweeping than the instant Ban

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and contained none of the categorical disparaging language about the character of transgender servicemembers present here. *Id.* Unlike this Ban, the 2018 ban also contained meaningful exemptions for certain transgender servicemembers. Nevertheless, the *Karnoski* court held that the 2018 ban classified "based on transgender status," and was therefore subject to heightened scrutiny. *Id.* Since then, the Ninth Circuit has repeatedly affirmed that classifications based on transgender status warrant heightened scrutiny. *See, e.g.*, *Doe v. Horne*, 115 F.4th 1083, 1102 (9th Cir. 2024); *Hecox v. Little*, 104 F.4th 1061, 1079 (9th Cir. 2024), as amended (June 14, 2024); *see also* Dkt. 23 at 21-23.[3]

Defendants ignore these controlling precedents to argue the Ban does not classify based on transgender status because the "standards do not exclude all trans-identifying individuals." Dkt. 76 at 15. In other words, Defendants claim that the Ban applies only to persons with a medical history of gender dysphoria, not necessarily all trans-identifying people. This argument lacks merit for three reasons.

First, it is factually wrong and foreclosed by precedent. The Department of Defense ("DoD") proclaimed in no uncertain terms that "*[t]ransgender troops* are disqualified from service" simply because they are transgender. Dkt. 61-2 (emphasis added); *see also Talbott* Op. at

[3] Defendants contend transgender people do not meet the factors for being a quasi-suspect class. Dkt. 76 at 16-17. But they do. Dkt. 23 at 22-23 (collecting cases); *see also Talbott* Op. at 51-57. Regardless, not all considerations are necessary. The first two alone (the group has been historically "subjected to discrimination," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and has a defining characteristic bearing no "relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440-41) may be dispositive. *See Plyler v. Doe*, 457 U.S. 202, 216 & n.14 (1982). Besides, Defendants' immutability argument misses the mark. "No 'obvious badge' is necessary." *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (quoting *Mathews v. Lucas*, 427 U.S. 495, 506 (1976)). "[T]he test is broader," *id.*, as it includes whether individuals exhibit "distinguishing characteristics that define them as a discrete group." *Bowen*, 483 U.S. at 602. Further, "transgender people are unarguably a politically vulnerable minority." *F.V. v. Barron*, 286 F.Supp.3d 1131, 1145 (D. Idaho 2018) (subsequent history omitted). One need only look at the administration's actions the past two months. Reminiscent of book burnings from bygone eras, the administration has sought to erase any recognition of transgender people from and by any part of the federal government. Dkt. 31-13, §3(e); *see also* Dkts. 31-21, 31-22, 31-23. It has also eliminated protections for transgender people and adopted discriminatory policies affecting their ability to participate in society in all aspects of life, from health care and education to housing and employment. *See, e.g.*, Dkt. 31-13; **Exhibits 27, 28, 29, 30, 31**. This context further illustrates the animus motivating the Ban.

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20-21. And in *Karnoski*, the Ninth Circuit noted that references to "transgender persons" demonstrated that "the 2018 Policy on its face treats transgender persons differently than other persons." 926 F.3d at 1201. Moreover, the Ban forbids military service by people who have "a gender identity inconsistent with an individual's [birth] sex." Military Ban §1. *That, of course, is the very definition of being transgender.* Dkt. 37, ¶25; Dkt. 71-3 at 18. Moreover, the Ban is not limited to a gender dysphoria diagnosis or a history of such; the Ban prohibits any person who has shown *symptoms* of gender dysphoria or has ever *attempted to transition* from military service and requires people to live consistent with their birth sex in every aspect of their lives. Dkts. 58-7, 64-1. However, even "[t]he mere acknowledgment of being transgender inherently reveals a disconnect between one's gender identity and assigned birth sex, which would be considered a 'symptom' of gender dysphoria and implies the potential for transition." Ettner Suppl. Decl. ¶10. This is a distinction without a difference. *Id.*; *see also id.* ¶¶13-14; Wagner Suppl. Decl. ¶¶17-18; Skelly Suppl. Decl. ¶10.

Second, that the Ban's implementing guidance targets those who experience gender dysphoria illustrates the purposeful and facial discrimination based on transgender status and, consequently, sex. By targeting gender dysphoria, the Ban and the guidance simply target "transgender identity by proxy." *Kadel v. Folwell*, 100 F.4th 122, 149 (4th Cir. 2024) (en banc). That is because "gender dysphoria is so intimately related to transgender status as to be virtually indistinguishable from it." *Id.* at 146; *C.P. ex rel. Pritchard v. Blue Cross Blue Shield of Ill.*, 2022 WL 17788148, at *6 (W.D. Wash. Dec. 19, 2022) (Bryan, J.) ("A person cannot suffer from gender dysphoria without identifying as transgender.") (cleaned up). This is simply one of those circumstances in which a "proxy's fit is sufficiently close to make a discriminatory inference plausible." *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 959 (9th Cir. 2020) (quotation omitted).

Third, the Ban and the guidance's definition of sex also demonstrates the purposeful discriminatory nature of the Ban towards transgender people. The Ban and the guidance adopt the

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Gender Order's exclusionary definitions, which were "carefully drawn to target transgender [servicemembers]" for exclusion. *Hecox*, 104 F.4th at 1078. This is so even though the definition of sex "is likely an oversimplification of the complicated biological reality of sex and gender." *Id.* at 1076.[4]

Finally, even assuming *arguendo* that the Ban targeted most, but not all, transgender individuals, that would not save it. "A law is not immune to an equal protection challenge if it discriminates only against some members of a protected class but not others." *Hecox*, 104 F.4th at 1079; *see also Rice v. Cayetano*, 528 U.S. 495, 516-17 (2000); *Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977); *Kadel*, 100 F.4th at 144.

3. The Ban Purposely Discriminates Based on Sex.

Defendants argue that the Ban "does not distinguish based on sex" because "it regulates all servicemembers, 'regardless of sex.'" Dkt. 76 at 17. But the Supreme Court already rejected this "equal application" argument in the context of sex classifications. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n.13 (1994); *id.* at 159-60 (Scalia, J., dissenting).

Defendants also assert that *Bostock v. Clayton County*, 590 U.S. 644, 660 (2020), is inapposite. Dkt. 76 at 17-19. This contention defies the Ninth Circuit's holding, citing *Bostock*, that "discrimination on the basis of transgender status is a form of sex-based discrimination." *Hecox*, 104 F.4th at 1079.

Regardless, the Ban and the guidance indisputably turn on sex. They are premised on the notion that adopting "a gender identity inconsistent with <u>*an individual's [birth] sex*</u> conflicts with a soldier's commitment to an honorable, truthful, and disciplined lifestyle." Military Ban §1 (emphasis added). The Ban prohibits military service by anyone who "express[es] a false 'gender

[4] Even if *Karnoski* were not controlling, and even without "suspect" or "quasi-suspect" classifications, which are present here, the Supreme Court has struck down laws "when there are historic patterns of disadvantage suffered by the group adversely affected by the statute." *Windsor*, 699 F.3d at 180; *see also Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 682 F.3d 1, 10 (1st Cir. 2012) (citing *USDA v. Moreno*, 413 U.S. 528 (1973); *Cleburne*, 473 U.S. 432; *Romer*, 517 U.S. 620). These decisions demand that "review … be more demanding" in such circumstances. *Windsor*, 699 F.3d at 180; *see also Massachusetts*, 682 F.3d at 10.

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identity' divergent from an *individual's [birth] sex*" and "use of pronouns that inaccurately reflect an *individual's [birth] sex*." Military Ban §§1, 2 (emphasis added). The guidance also requires that servicemembers "be willing and able to … [meet] the standards associated with *his or her [birth] sex*" and that they "ha[ve] never attempted to transition to *any sex other than his or her [birth] sex*." Dkt. 64-1, at 1-2 (emphasis added).

4. Defendants Cannot Justify the Ban.

Defendants primarily seek to justify the Ban based on the 2018 Mattis Report, which was based on speculative and hypothetical concerns as opposed to concrete data and the actual experience of actively serving transgender servicemembers.[5] In doing so, Defendants ignore or misleadingly represent the real-life experience of actively serving transgender servicemembers, as exemplified by Plaintiffs and the experience of so many others during the approximate decade in which transgender servicemembers have served under the Carter Policy, the Mattis Policy (if grandfathered), and the Austin Policy. "[H]ad Defendants conferred with transgender servicemembers and those who serve with them, instead of making specious generalizations, they might have learned that the Military Ban is little more than a solution in search of a problem." *Talbott* Op. at 62.

In seeking to justify the Ban, Defendants cite purported concerns about military readiness, unit cohesion, and costs. None of these are availing, as even a cursory review reveals. *See Talbott* Op. at 57-64.

a) Military Readiness.

With no sense of irony, Defendants argue that they are concerned about the wellbeing of transgender people: "DoD is concerned about subjecting those with a history of gender dysphoria to the unique stresses of military life." Dkt. 76 at 20. But Active-Duty Plaintiffs are acutely aware of the "unique stresses of military life"—each has experienced it for at least a decade.

[5] The 2018 Mattis Report's misconceptions and faulty analysis were thoroughly explored and refuted in a report authored by former military surgeons general. *See* **Exhibit 32**.

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Cumulatively, they have nearly 100 years of boots-on-the-ground military service. Their military experience is neither speculative nor hypothetical; it is a record of distinguished and honorable service. Each is highly decorated, and several have served in combat and been successfully deployed to austere deployments. *See* Dkts. 24 ¶¶4, 6-7, 14; 25 ¶¶4-6, 11; 26 ¶¶5, 7, 17; 27 ¶¶3, 5-6, 12; 28 ¶¶5, 7-9; 39 ¶¶5, 7-8, 17; Moran Decl. ¶11; *see also* **Exhibit 33**.

Defendants have access to nearly ten years of data related to active-duty transgender military service. "That Defendants did not review the impact of their service does not mean it does not exist." *Talbott* Op. at 58. But rather than undergo a thoughtful and scrupulous assessment of these data, Defendants instead rushed forward with a Ban, dusted off the 2018 Mattis Report, and tacked on a couple misleading cites to reports in trying to justify their view that transgender people are unfit to serve in the military. Such a "rushed and haphazard" implementation is highly unusual in the development of military policy. Wagner Suppl. Decl. ¶¶25-26; Skelly Suppl. Decl. ¶20; *see also Talbott* Op. at 22-23.

Mental health disparities: The military has universal medical standards that all servicemembers—including transgender troops—are required to meet for accession or retention. Dkt. 31-12 (DoDI 6130.03, Vol.1), §1.2(d); Dkt. 73-5 (DoDI 6130.03, Vol.2), §1.2(a). Rather than rely on and apply those neutral standards to transgender servicemembers who are otherwise qualified and have otherwise been assessed for mental health concerns, Defendants seek to categorically bar all transgender people from serving based on misleadingly cited statistics about mental health co-morbidities, including suicidality in the transgender population.

But "peer-reviewed research consistently demonstrates that disparities in mental health outcomes among transgender individuals are primarily driven by external sociocultural and institutional factors rather than inherent psychological conditions." Ettner Suppl. Decl. ¶21. In fact, the Literature Review cited by Defendants, which "did not survey studies on transgender persons in military service," *Talbott* Op. at 27, expressly states that these mental health disparities are "largely driven by minority stress, discrimination, social rejection, lack of access to gender-

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affirming care, and increased exposure to violence and victimization." Dkt. 71-4 at 2. Contrary to Defendants' misleading portrayal, the Literature Review concludes that "[r]esearch demonstrates that suicide risk among transgender … individuals is *mitigated by access to gender-affirming care*, strong social and family support, *legal and social recognition*, affirming mental health services, community connectedness, and *protections against discrimination*." *Id.* (emphasis added).

Defendants cite the 2018 Mattis Report to repeat the falsehood that transgender servicemembers are eight times more likely to *attempt* suicide. Dkt. 76 at 21. But not only does the military already restrict individuals who are suicidal from enlisting, Dkt. 31-12 §6.28(m), a cursory review of the data shows the summary of results addresses suicidal *ideation*, not suicidal *attempts*. Dkt. 73-2 at 9. In addition, the higher rates of suicidal ideation are not "necessarily attributable to a higher presence of mental health co-morbidities in the transgender population, but rather to the higher frequency of interactions with mental health and medical providers." Ettner Suppl. Decl. ¶18; *see also id.* ¶19. Moreover, none of the reports relied on by Defendants look at what differences there are, if any, between transgender servicemembers diagnosed with gender dysphoria and cisgender servicemembers with other conditions in this regard.

Defendants likewise misleadingly use mental health encounter data from the 2018 Mattis Report to improperly infer that transgender servicemembers are mentally unfit to serve. Dkt. 76 at 21. Defendants omit that transgender servicemembers are *required* to make frequent mental health appointments regardless of their actual need or stability. In fact, "[a] substantial portion of mental health interactions among transgender individuals is attributable to institutional and regulatory requirements," which "significantly increase recorded mental health visits, thereby creating a misrepresentation of mental health co-morbidities within the transgender population." Ettner Suppl. Decl. ¶17. The transition process *requires* these visits in accordance with a treatment plan. Dkt. 33-4, §§3.2(a)(3), 3.2(b); **Exhibit 32**, at 24. In other words, Defendants grossly mispresent the data and seek to penalize transgender servicemembers for following their individual transition plans, as required, to successfully change their gender in the DEERS system.

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Defendants' reliance on the AMSARA Report is also misplaced. Defendants misleadingly cite this report to argue that transgender servicemembers experience higher rates of disability evaluations than other servicemembers. Dkt. 76 at 31; *but see Talbott* Op. at 25-27, 58-59. But the AMSARA Report says no such thing. Defendants limit the AMSARA Report's conclusion that transgender servicemembers "appear similar to the full military applicant pool," that rates of adverse attrition are the same, and that transgender servicemembers "remain in service for longer durations than individuals with other medical conditions, including common psychiatric diagnoses." Ettner Suppl. Decl. ¶37; Dkt. 71-3 at 24.

Defendants misleadingly rely on the Literature Review's observation that the strength of the evidence pertaining to gender-affirming care tends to be low to moderate. Dkt. 76 at 22. What Defendants fail to clarify is that such terms are medical terms of art and that "[m]any widely accepted and routinely performed medical interventions do not meet the threshold for 'high-quality' evidence." Ettner Suppl. Decl. ¶26. Indeed, the evidence base for gender-affirming care is "as robust as many other common medical interventions." *Id*.

Deployability: Defendants ignore that transgender servicemembers, including Plaintiffs, have deployed around the world, including to combat zones and austere environments. Defendants cite the AMSARA Report to argue that "nearly 40%" were non-deployable over a 24-month period. Dkt. 76 at 21. But the AMSARA Report only "estimate[d] that *fewer than* 40% of the transgender service members … would have been deemed non-deployable due to mental health reasons *at some time* during the 24 months following initial diagnosis." Dkt. 71-3 at 15 (emphasis added). Defendants do not identify how this number compares to non-transgender servicemembers with other conditions or generally among servicemembers, nor how long a servicemember was nondeployable. Ettner Suppl. Decl. ¶¶33-39. Indeed, the AMSARA Report notably "does not include a valid comparison to non-transgender service members, making it impossible to assess whether transgender personnel experience disproportionately higher rates of non-deployability or attrition." *Id.* ¶35. Indeed, it expressly acknowledges this limitation. Dkt. 71-3 at 11-12.

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The AMSARA Report did, however, compare retention and deployability for transgender servicemembers to non-transgender servicemembers diagnosed with depression, and it found that "the transgender cohort stayed in service longer, on average, than did the depression cohort" and "also had a greater proportion of members available for deployment than the depression cohort." Ettner Suppl. Decl. ¶36.; Dkt. 71-3 at 12. In other words, "members of the transgender cohort are more deployable than members of the matched cohort of service members with depressive disorders." *Id.* Yet Defendants do not categorically bar servicemembers "who have a current diagnosis or history of, or exhibit symptoms consistent with," depression. *See* Wagner Suppl. Decl. ¶8; *see also* Dkt. 73-5, §5.28.

b) Unit Cohesion.

Defendants also dust off the 2018 Mattis Report to argue that allowing military service by transgender persons disrupts unit cohesion. Dkt. 76 at 23-25. But the argument fails. *See Talbott* Op. at 60-62. Defendants identify no unit cohesion issues except a hypothetical concern that "absent the creation of separate facilities," transgender servicemembers would undermine expectations of privacy. Dkt. 76 at 23-24. Plaintiffs do not seek separate facilities, and hypothetical disruptions to unit cohesion are insufficient to justify Defendants' policy under heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). Furthermore, multiple courts, including the Ninth Circuit, have held that allowing transgender people to live in accordance with their gender identity does not harm the privacy or safety of others. *See, e.g.*, *Parents for Priv. v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018).

Defendants summarily dismiss the sworn declarations from former military officials who testify that there have been no issues with unit cohesion, specifically challenging the knowledge basis of former Under Secretary Gil Cisneros. Dkt. 76 at 25; *but see* Dkt. 36, ¶19. But it is inconceivable that none of these officials would have become aware of these issues, which Defendants purportedly consider serious, if they existed. Regardless, Defendants offer no

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contradictory testimony, nor challenge the knowledge basis for the declarations of the other former military officials. *See* Dkt. 32, ¶28; Dkt. 33, ¶35; Dkt. 34, ¶15; Dkt. 35, ¶¶17-18; Dkt. 38, ¶15; *Talbott* Op. at 36 ("Defendants … have proffered no evidence to contradict these assertions.").

It is not just officials under the Austin policy who have reported no issues with unit cohesion, however. The Chairman of the Joint Chiefs in 2018 testified, "the issue with transgender [service] has never been about cohesion or discipline anyway," and as long as troops are able to meet the generally applicable standards, he did not "expect to see discipline or issues of unit cohesion." Dkt. 76-4 at 58:20-59:2. Indeed, all four service chiefs testified in 2018 that they had not seen threats to unit cohesion. *See* **Exhibit 34**.

In truth, unit cohesion is gravely harmed by the Ban, which disrupts chains of command and career progression and threatens the loss of distinguished servicemembers. Skelly Suppl. Decl. ¶¶7-8.

c) Cost.

Defendants seek to justify the Ban with cost data showing that DoD spent over $52 million providing care for transgender servicemembers from 2015-2024. However, as Defendants recognize, this "is but a small fraction of DoD's overall budget" and "is likewise a small fraction of DoD's total medical budget." Dkt. 73-3 at 2. And while Defendants do not identify how much the military spends overall on psychotherapy, hormone therapy, and surgical care generally or in comparison to similar conditions, in 2023, the military spent nearly eight times as much on Viagra ($41 million) as it does on transgender health care in a given year ($5.2 million). Wagner Suppl. Decl. ¶24. Also, the cost comparison in the 2018 Mattis Report ignores that the spike in cost was attributable to the availability of treatment that had been previously denied to transgender servicemembers. Dkt. 73-2 at 31-32; *see also Talbott* Op. at 62-63.

Finally, Defendants' argument is largely beside the point, as "the Supreme Court has rejected the argument that cost-cutting is a sufficient reason" for denying equal protection of the

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law. *Latta v. Otter*, 19 F.Supp.3d 1054, 1083 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014); *see also Graham v. Richardson*, 403 U.S. 365, 375 (1971); *Windsor*, 699 F.3d at 186-87.

C. The Ban Violates Plaintiffs' First Amendment Rights.

The Ban's various attacks on transgender people are an ideology. The notion that "a gender identity inconsistent with an individual's sex conflicts with a soldier's commitment to an honorable, truthful, and disciplined lifestyle, even in one's personal life," Military Ban §1; the guidance's declaration that transgender people do not embody the values of "honesty," "humility," and "integrity," Dkt. 58-7 §1(b); and the Gender Order's proclamation that "gender ideology" is the "false claim that males can identify as and thus become women and vice versa" and that "gender identity "does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex," Dkt. 31-13, §§2(f), (g), all represent a system of ideas—a viewpoint.

By imposing these viewpoints and ideology and demanding adherence to them (even in private), the Ban and its guidance chill the speech of transgender servicemembers who will not risk their career and reputation to be candid about who they are. "[A]cknowledgement and disclosure of one's identity, which is a definitional aspect of being transgender, is a critical step in any person's gender transition[.]" Ettner Suppl. Decl. ¶13.

Defendants trivialize Plaintiffs' First Amendment claim by focusing myopically on pronoun usage, and they characterize transgender servicemembers as seeking autonomy that is not available in the military context. Not so. Plaintiffs simply seek the ability to express their gender just as any other servicemember. This is not akin to an individual seeking some anomalous expression that deviates from generally applicable neutral regulations that prohibit such expression; rather, the Ban prohibits transgender servicemembers, and only them, from expressing their gender identity and expressing themselves consistent with it, even in private. *See* Military Ban §1; Dkt. 58-7 §§1(c), (h). Thus, in addition to discriminating against protected speech based on viewpoint, the government also creates speaker-based discrimination for the sole purpose of exercising a content preference. *Turner Broad. Sys., Inc. v. FCC*, 512 U. S. 622, 658 (1994)

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(explaining that strict scrutiny applies to regulations reflecting "aversion" to what "disfavored speakers" have to say). Transgender servicemembers rightfully fear they will no longer be able to honestly disclose their transgender status and face a "realistic danger of sustaining a direct injury as a result of the [Ban's] operation and enforcement," *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010).

D. Active-Duty Plaintiffs Have Established a Due Process Violation.

Active-Duty Plaintiffs had a reasonable expectation, giving rise to a property interest, that their military-approved transition plans would not result in their separation.[6] *See Baker v. City of SeaTac*, 994 F.Supp.2d 1148, 1154 (W.D. Wash. 2014) (reasonable expectation giving rise to protectible interest in employment may be based on "mutually explicit understandings"). Defendants, who rely heavily on the 2018 Mattis Report, can hardly argue otherwise. That report, in exempting current servicemembers from its exclusionary policy, found: "*The reasonable expectation of these Service members that the Department would honor their service on the terms that then existed cannot be dismissed.*" Dkt. 31-10 at 48 (emphasis added).

Defendants' cited authority acknowledges that, even absent a freestanding property interest, Active-Duty Plaintiffs have a claim under the "stigma plus" test where they are "stigmatized in connection with the denial of a more tangible interest." *Fikre v. Fed. Bureau of Investigation*, 35 F.4th 762, 776 (9th Cir. 2022) (quotation omitted), *aff'd*, 601 U.S. 234 (2024); *Smith v. Harvey*, 541 F.Supp.2d 8, 16 (D.D.C. 2008). In *Smith*, the court observed that, even absent a general right to be enlisted or reenlisted in the military, the Due Process Clause is implicated where the government "impugns" a person's reputation, honor, or integrity by "excluding" her from a "range of employment opportunities with the government." 541 F.Supp.2d at 16.

Defendants wrongly argue that Active-Duty Plaintiffs cannot establish a "stigma plus" claim if their discharge records do not reiterate the stigmatizing basis for their discharge. There is

[6] *Christofferson v. Washington State Air National Guard*, 855 F.2d 1437, 1443 (9th Cir. 1988), which involved reservists who were reviewed annually for retention, did not involve separation for previously approved acts and did not discuss stigma plus claims.

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no basis to find that the Ban and its guidance are not public "stigmatizing statement[s] by the government" connected to Plaintiffs' separations, which is all that is required. *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002); *see Smith*, 541 F.Supp.2d at 16. The fact that Plaintiffs were categorically stigmatized early in the process—rather than after an individual investigation—makes Defendants' position weaker, not stronger.

Nor can Defendants cure this constitutional violation by offering sham proceedings to Active-Duty Plaintiffs. Dkt. 76 at 30-31; *see also* **Exhibit 35**, ¶¶9, 15. Active-Duty Plaintiffs do not challenge the procedures that will be used to determine whether, for example, a particular individual has a history of gender dysphoria. Each Active-Duty Plaintiff has transitioned to a sex other than their birth sex (*see* Dkt. 24, ¶10; Dkt. 25, ¶9; Dkt. 26, ¶10; Dkt. 27, ¶8; Dkt. 28, ¶11; Dkt. 30, ¶3; Dkt. 39, ¶13; Dkt. 62, ¶14; Moran Decl. ¶13). Based on the guidance, that fact alone makes them ineligible for a waiver, regardless of service, deployability, medical needs, or any other factor. Dkts. 64-1; 58-7, §4.3(c)(2). As a result, no other fact remains to be determined by any administrative body. As such, Plaintiffs challenge the basis of Defendants' pre-ordained disqualification as unconstitutional—a legal issue ripe for review and not curable by meaningless process. *See Downen*, 481 F.2d at 643 (claim founded on constitutional right is "singularly suited" to judicial forum and inappropriate to military board).

E. Defendants Should be Estopped from Retroactively Discharging Active-Duty Plaintiffs.

Defendants ask the Court to disregard that the Ninth Circuit has established a specific test for applying estoppel against the government, which protects against its application to mere policy changes.[7] *See Watkins v. U.S. Army*, 875 F.2d 699, 706-07 (9th Cir. 1989). By seeking an

[7] Defendants' out-of-circuit cases do not meaningfully discuss the issue of policy discretion. *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995) states the general principle that government should not be "unduly hindered" in changing policy, but it does not analyze an equitable estoppel claim. In *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984), the court merely found it was not reasonable to rely on government conduct that was contrary to law.

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exemption even from this more stringent test, Defendants seek an exemption from even the minimum standards of decency and fair play that apply in the military context. *Id.* This is especially true here, where Defendants seek to purge the same servicemembers it previously found had reasonably relied on terms of service that allowed them to take irreversible steps to transition. Dkt. 31-10 at 48.

Defendants' reliance on *Doe 1 v. Trump*, 275 F.Supp.3d 167 (D.D.C. 2017), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019), is misplaced. There, the court found the broad 2016 Carter Policy itself did not constitute a "definite representation to any of the individual Plaintiffs." *Id.* at 206. The court distinguished *Watkins*, which had involved "representations … directed at the plaintiff." *Id.* Here, Active-Duty Plaintiffs have each cited direct action by Defendants to approve their personal transition plans, upon which they detrimentally relied in taking steps now being used as a retroactive basis for separation. Dkt. 23 at 34 (collecting record cites). For example, Commander Shilling postponed coming out in the workplace until the DoD provided "transition procedures that would allow [her] to continue serving indefinitely." Dkt. 24, ¶10. That assurance allowed her to feel "confident that [she] could continue [her] career to at least 20 years, and beyond" without fear of reprisal. *Id.*

Active-Duty Plaintiffs have satisfied the traditional elements of estoppel: They reasonably relied upon individual approval of their transition plans, as Defendants have admitted. Dkt. 31-10 at 48. The previous policy changes cited by Defendants do not change the reasonableness of their reliance, as each of those iterations (until 2025) allowed transgender servicemembers who had previously transitioned to remain in service. Take, for example, Plaintiffs Dremann and Schmid, who transitioned in the military in 2015 and 2016, respectively, and have been serving continually since that time. Dkt. 25, ¶8; Dkt. 39, ¶13.

Defendants' attempt to insert a more stringent misconduct requirement also fails. In *Watkins*, the Ninth Circuit clarified that there is no single test for the "affirmative misconduct" element, which can be satisfied by a misrepresentation of material facts, and that the government

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need not have intended to mislead. 875 F.2d at 707. Here, it is a material representation for a commanding officer to formally approve an individual plan of action that is then retroactively used to mandate a servicemember's discharge.

F. Plaintiffs Are Suffering Irreparable Harms.

Defendants fundamentally fail to appreciate the enormity of irreparable harm that the Ban will inflict on Plaintiffs if preliminary relief is not granted. Dkt. 23, at 35-36. Notably, Defendants fail to even address the fact that constitutional violations result in immediate irreparable injury *as a matter of law* and instead assert two woefully deficient arguments.

First, Defendants seek to reduce Plaintiffs' harms to the loss of employment and other collateral consequences common to most terminated employees. But Plaintiffs' harms are different: The Ban severely disrupts the chain of command and erodes unit cohesion and trust. Skelly Suppl. Decl. ¶5. The Ban also cuts off access to necessary health care for transgender servicemembers, which itself constitutes irreparable harm. *Id.* ¶¶10-11; *see also PFLAG, Inc. v. Trump*, 2025 WL 685124, at *28 (D. Md. Mar. 4, 2025); *Washington v. Trump*, 2025 WL 659057, at *26 (W.D. Wash. Feb. 28, 2025). And in Plaintiff Medina's case, the loss of the "opportunity to pursue" his chosen profession in the military also "constitutes irreparable harm." *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (limiting of professional opportunities and loss of opportunity to pursue chosen professions constituted irreparable harm).

Second, Defendants claim any injuries can be remedied through back pay, time in service credit, and review by the administrative separation board. "Back pay and other monetary damages proposed by Defendants will not remedy the stigmatic injury caused by the policy, reverse the disruption of trust between service members, nor cure the medical harms caused by the denial of timely health care." *Karnoski*, 2017 WL 6311305, at *9. As noted, Plaintiffs' injuries go well beyond economic injuries to constitutional deprivations that may forever constrain Plaintiffs' professional careers. The idea that monetary relief can repair a military career built on the intangible qualities of patriotism, loyalty, and trust is severely misplaced. As for the administrative

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separation board, as explained, this "remediation" pathway is futile, making Plaintiffs' injuries irreparable. *See supra* Section II.D.

Absent an injunction, Plaintiffs will be irreparably harmed. Plaintiffs have already explained why all the remaining equitable factors favor injunctive relief. Dkt. 23 at 37-38.

III. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for a preliminary injunction.

Pursuant to Local Rules W.D. Wash. LCR 7(e)(6), I certify that this memorandum contains 6,487 words, in compliance with the word limit set forth in the Court's order.

Dated this 19th day of March 2025.

Respectfully submitted,

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